

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

SAUL CLAROS,)
)
Plaintiff,)
)
vs.)
)
LANDAMERICA ONESTOP, INC.;)
MORTGAGE ELECTRONIC)
REGISTRATION SYSTEMS; METLIFE)
HOME LOANS; FIRST HORIZON HOME)
LOANS CORPORATION; UTLS NATIONAL)
DEFAULT SERVICES, LLC; S.B.)
MANAGEMENT, LLC, David Zepeda, Trustee)
of the David Rose, Chris Rose, Sam Kirby, Irv)
Kirby, Jack, Cad, Lydia Cadman, Kenneth)
Gilbert, Fran Gilbert Trust, W.J. Bradley, Frank)
Ruualcaba; Bonnie Mac, Individually; Federal)
National Mortgage Association UNKNOWN)
BENEFICIARIES/SUCCESSORS AND/OR)
PREDECESSORS *an ens legis being used to*)
conceal fraud, AND JOHN DOES)
INVESTORS 1-50, et. al.,)
)
Defendants.)

Case No.: 2:10-cv-1788-RLH-PAL

ORDER

(Motion to Dismiss-#10;
Motion to Dismiss-#21;
Motion to Dismiss-#38)

Before the Court is Defendant Mortgage Electronic Registration Systems, Inc.’s (“MERS”) **Motion to Dismiss** (#10, filed Nov. 10, 2010) for failure to state a claim. The Court has also considered Plaintiff Saul Claros’ Opposition (#18, filed Nov. 18. 2010), and MERS’ Reply (#25, filed Nov. 29, 2010).

1 Also, before the Court is Defendants Federal National Mortgage Association
2 (“Fannie Mae”) and Lender Business Process Services’ (“LBPS”) **Motion to Dismiss** (#21, filed
3 Nov. 22, 2010) for failure to state a claim. The Court has also considered Claros’ Opposition
4 (#28, filed Nov. 30, 2010), and Fannie Mae and LBPS’ Reply (#37, filed Dec. 10, 2010).

5 Finally, before the Court is Defendants MetLife Bank, N.A. (“MetLife”) and First
6 Horizon Home Loans Corporation’s (“First Horizon”) **Motion to Dismiss** (#38, Dec. 27, 2010) for
7 failure to state a claim. Claros did not file an opposition.

8 BACKGROUND

9 In November 2004, Claros refinanced his home located in Las Vegas. The deed of
10 trust for the refinanced mortgage loan named First Horizon as the lender, Fidelity National Title as
11 the trustee, and MERS as the beneficiary. In late 2008 or early 2009, Claros defaulted on this loan
12 and Defendant LandAmerica Onestop, Inc., acting as agent for MERS, issued a notice of default.
13 Claros subsequently hired Defendant S.B. Management, a California company, to assist him in
14 modifying the loan or to stop the pending foreclosure. Specifically, Claros alleges that S.B.
15 Management promised to pay off the refinanced loan and accept monthly payments from Claros
16 until the debt was paid in full. However, S.B. Management allegedly never followed through on
17 that promise.

18 Then in February 2010, MERS transferred all beneficial interest under the deed of
19 trust to MetLife. MetLife then substituted Defendant UTLS Default Services (“UTLS”) as the
20 trustee under the deed of trust and on April 15, UTLS recorded a notice of trustee sale.
21 Accordingly, on June 17, UTLS sold Claros’ home to MetLife at a trustee sale. Metlife
22 subsequently transferred the property to Fannie Mae, which currently holds legal title to the home.

23 On October 14, 2010, Claros filed a complaint asserting two claims under the Truth
24 in Lending Act (“TILA”), 15 U.S.C. § 1601, *et seq.*, one claim under NRS § 107.080, and one
25 wrongful foreclosure claim. Each claim appears to have been asserted against each Defendant.

26 ///

1 Defendants MERS, UTLS, Fannie Mae, LBPS, MetLife and First Horizon subsequently filed
2 motions to dismiss. For the reasons discussed below, the Court grants Defendants' motions.

3 DISCUSSION

4 I. Standard of Review

5 A court may dismiss a plaintiff's complaint for "failure to state a claim upon which
6 relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide "a short
7 and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P.
8 8(a)(2). While Rule 8 does not require detailed factual allegations, it demands "more than labels
9 and conclusions" or a "formulaic recitation of the elements of a cause of action." *Ashcroft v.*
10 *Iqbal*, 129 S. Ct. 1937, 1949 (2009). "Factual allegations must be enough to rise above the
11 speculative level." *Twombly*, 550 U.S. at 555. Thus, to survive a motion to dismiss, a complaint
12 must contain sufficient factual matter to "state a claim to relief that is plausible on its face." *Iqbal*,
13 129 S. Ct. at 1949 (internal citation omitted).

14 In *Iqbal*, the Supreme Court recently clarified the two-step approach district courts
15 are to apply when considering motions to dismiss. First, a district court must accept as true all
16 well-pled factual allegations in the complaint; however, legal conclusions are not entitled to the
17 assumption of truth. *Id.* at 1950. Mere recitals of the elements of a cause of action, supported only
18 by conclusory statements, do not suffice. *Id.* at 1949. Second, a district court must consider
19 whether the factual allegations in the complaint allege a plausible claim for relief. *Id.* at 1950. A
20 claim is facially plausible when the plaintiff's complaint alleges facts that allows the court to draw
21 a reasonable inference that the defendant is liable for the alleged misconduct. *Id.* at 1949. Where
22 the complaint does not permit the court to infer more than the mere possibility of misconduct, the
23 complaint has "alleged—but not shown—that the pleader is entitled to relief." *Id.* (internal
24 quotation marks omitted). When the claims in a complaint have not crossed the line from
25 conceivable to plausible, plaintiff's complaint must be dismissed. *Twombly*, 550 U.S. at 570.

26 ///

II. Analysis

A. TILA

TILA requires creditors to disclose certain information about the terms of a loan to the prospective borrower. *See*, 15 U.S.C. §§ 1631–1632, 1638; 12 C.F.R. § 226.17. A creditor who fails to comply with TILA’s requirements is liable to the borrower for damages. 15 U.S.C. § 1640(a). However, damages claims under TILA must be brought within one year from the date of the occurrence of the violation (*i.e.*, closing). Furthermore, TILA also provides borrowers with the right to rescind a mortgage transaction under certain parameters. 15 U.S.C. § 1635(a). However, the borrowers right of rescission must be exercised within three years after the date of the consummation of the transaction (*i.e.*, closing) or before the property in question is sold, whichever occurs first. 15 U.S.C. § 1635(f). Finally, the remedy of rescission is available only where a borrower is willing and able to tender the balance on the promissory note. *Yamamoto v. Bank of N.Y.*, 329 F.3d 1167, 1173 (9th Cir. 2003).

Claros seeks both damages and rescission under TILA. However, the loan in question closed in November 2004 and Claros commenced this action in October 2010—more than six years later. Therefore, Claros’ TILA claim fails under the statute of limitations (his damages claim expired in November 2005 and his rescission claim expired in November 2007). Claros’ TILA claim also fails because he has not alleged that he is willing and able to tender the remaining balance on his debt. Accordingly, the Court dismisses Claros’ first and second causes of action.

B. Wrongful Foreclosure

“An action for the tort of wrongful foreclosure will lie if the trustor or mortgagor can establish that at the time the power of sale was exercised or the foreclosure occurred, no breach of condition or failure of performance existed on the mortgagor’s or trustor’s part which would have authorized the foreclosure or exercise of the power of sale.” *Collins v. Union Fed. Sav. & Loan Ass’n*, 662 P.2d 610, 623 (Nev. 1983). Claros’ wrongful foreclosure claim fails

1 because at the time of foreclosure he was in breach of the terms of the deed of trust. Therefore, the
2 Court dismisses Claros' third cause of action.

3 **C. NRS § 107.080**

4 NRS § 107.080 requires, among other things, the trustee or beneficiary of a deed of
5 trust to record a notice of default and election to sell the property subject to the deed of trust before
6 that property is sold. Section 107.080(3) further requires the trustee to mail a copy of the notice of
7 default and election to sell to the trustor (*i.e.*, the debtor), before the subject property is sold. A
8 sale made pursuant to § 107.080 may be declared void if the trustee or beneficiary does not
9 substantially comply with these requirements.

10 Claros alleges that the Defendants violated NRS § 107.080(3) by failing to properly
11 notify him of the trustee's sale. However, as discussed below, the Court takes judicial notice of
12 the "Notice of Breach and Default and of Election to Cause Sale of Real Property Under Deed of
13 Trust," which was recorded on April 24, 2009, and substantially complies with NRS § 107.080. In
14 addition, Claros does not allege that Defendants failed to mail this document to him. Therefore,
15 Claros fails to allege sufficient facts for this claim to be plausible. Accordingly, the Court
16 dismisses Claros' fourth cause of action.

17 **III. Judicial Notice**

18 Pursuant to Rule 201(b) of the Federal Rules of Evidence, a court may take judicial
19 notice of facts that are not subject to reasonable dispute because they are "(1) generally known
20 within the territorial jurisdiction of the trial court or (2) capable of accurate and ready
21 determination by resort to sources whose accuracy cannot reasonably be questioned." Because the
22 "Notice of Breach and Default and of Election to Cause Sale of Real Property Under Deed of
23 Trust" (Dkt. #10, Ex. F, Mot. to Dis.) was recorded in the office of the Clark County Recorder it is
24 capable of accurate and ready determination. Therefore, the Court takes judicial notice of that
25 document.

26 ///

CONCLUSION

Accordingly, and for good cause appearing,

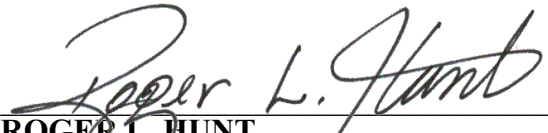
IT IS HEREBY ORDERED that MERS' Motion to Dismiss (#10) is GRANTED.

IT IS FURTHER ORDERED that Fannie Mae and LBPS' Motion to Dismiss (#21) is GRANTED.

IT IS FURTHER ORDERED that MetLife and First Horizon's Motion to Dismiss (#38) is GRANTED.

The Clerk of Court is instructed to close the case.

Dated: March 24, 2011


ROGER L. HUNT
Chief United States District Judge